Federal Court  Cour fédérale

Date: 20121009

Docket: T-133-11

Citation: 2012 FC 1175

Ottawa, Ontario, October 9, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

JOHN B. ARCHER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

FALSE CREEK HARBOUR AUTHORITY

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks to set aside a decision of the False Creek Harbour Authority (FCHA) not to renew his lease of a storage locker at the False Creek Fishermen's Terminal (Harbour) in Vancouver, British Columbia.

[2] For the reasons that follow the application is dismissed. While the FCHA does constitute a federal board, commission or other tribunal for limited purposes bearing directly on the discharge of its mandate to operate a public, commercial fishing harbour, the decision in question was not made in its capacity as a federal board. The application is thus dismissed on this threshold jurisdictional point.

[3] In any event, even if the decision in issue was that of a "federal board", the decision and policy upon which it was based and the process by which the decision was reached fully complied with the requirements of natural justice and procedural fairness. The application thus fails on the preliminary jurisdictional ground, and in the alternative fails on its merits.

Facts

[4] The FCHA is a not-for-profit corporation incorporated under Part II of the *Canada Corporations Act*, RSC 1970, c C-32. The FCHA operates and manages the Harbour pursuant to the Harbour Authority Lease Agreement (the Lease) signed with the Minister of Fisheries and Oceans (the Minister). A requirement of the Lease is that the FCHA use the leased premises to operate a public commercial fishing harbour.

[5] The applicant, John B. Archer, is the owner of a fishing vessel, the "Daffy", which he has moored at the Harbour since 2000. He has leased a gear storage locker at the Harbour since 2001. In its policy manual governing the administration of the Harbour (FCHA Policy Manual, Chapter 5, Directive 5.2, "Lockers"), the FCHA requires that gear storage lockers be reserved for the use of active commercial fishers.

[6] On March 9, 2010, the Harbour Manager of the FCHA notified the applicant by letter that it appeared that he did not meet the eligibility requirements for occupying a locker because he had not been active as a commercial fisher over the past three years. The letter requested a meeting with the applicant to discuss the issue. The parties agree that the "Daffy" was not used to fish commercially during that period.

[7] Subsequently, in a letter dated November 5, 2010, the President of the FCHA requested that the applicant produce documentation to establish that he was an active commercial fisher. The letter indicated that if the documentation was not provided by December 1, 2010, the Lease would be terminated effective December 31, 2010.

[8] There followed a series of exchanges between the applicant and the FCHA, at times through their respective counsel. The applicant objected to having to provide to the FCHA his income tax information, which it had requested to verify whether the applicant was an active commercial fisher. The applicant also took the position that he was exempt from the requirement to be an active commercial fisher pursuant to Bylaw 2(e), granting membership in the FCHA to all those who were members as of February 3, 2003. The applicant also objected to what he considered to be the uneven application of Directive 5.2, noting that others who were no longer actively fishing remained in possession of their lockers.

[9] On January 17, 2011, counsel for the FCHA sent an email to the applicant's counsel advising that the applicant had not established that he met the eligibility requirements for a locker

and that he must vacate his locker within seven days. The applicant seeks judicial review of this decision.

Issues

[10] The issues are:

a. Is the FCHA a "federal board, commission or other tribunal" for the purposes of the *Federal Courts Act*, RSC 1985, c F-7 (the *Act*)?

b. Is the FCHA's decision not to renew the applicant's locker lease reviewable under section 18.1 of the *Act*?

c. What is the appropriate standard of review?

d. Was the applicant afforded the requisite degree of procedural fairness by the FCHA in reaching its decision to revoke the Lease of the locker and was the decision to do so reasonable?

Analysis

Is the FCHA a federal board, commission or other tribunal?

[11] Pursuant to section 18.1 of the *Act*, judicial review is only available for decisions or actions of a "federal board, commission or other tribunal", which is defined under section 2 of the *Act*:

2. (1) In this Act,	2. (1) Les définitions qui suivent s'appliquent à la présente loi
…	
"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise	…
	« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou

jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867* ;	groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*.

[12] In *Anisman v Canada (Border Services Agency)*, 2010 FCA 52 at paragraph 29, the Federal Court of Appeal set out a two-stage test for whether a person or body fits this definition: "First, it must be determined what jurisdiction or power the body or person seeks to exercise. Second, it must be determined what is the source or the origin of the jurisdiction or power which the body or person seeks to exercise." The Federal Court of Appeal went on to note that the source or origin of the decision-maker's authority will be the primary consideration in determining if it fits the definition.

[13] Construed at its narrowest, the power the FCHA sought to exercise in this instance was the power to decide whether or not to renew a lease to a gear storage locker, which is an incidental aspect of its more general authority to operate and manage the Harbour.

[14] The respondent and the FCHA submit that the FCHA derives its authority from the Lease, which they characterize as a commercial agreement granting property rights to the FCHA. Therefore, they submit the FCHA was merely exercising its corporate powers in respect of the

property it leases from the Minister. In their submission, no decision of the FCHA, in respect of any matter, however made and in respect of any issue, is ever justiciable in the Federal Court. The FCHA is a tenant in possession, and if the Minister does not like the tenant, he can revoke the lease. Insofar as the applicant is concerned, his remedies are to become a member of the Board and seek to change the policies governing the operation of the Harbour or address his complaint to the Minister about the conduct of the leaseholder.

[15] The applicant argues that the Lease constitutes a sub-delegation of the Minister's authority under the *Fishing and Recreational Harbours Act*, RSC 1985, c F-24 (*FRHA*).

[16] Sub-delegation is "the granting by a delegate to another … of some part of the authority granted to the delegate by Parliament" (Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure before Administrative Tribunals (loose-leaf)* (Toronto: Carswell, 1988) (2012 update) at 5-20). As the respondent notes, there is a presumption against sub-delegation in administrative law, as articulated by the Latin maxim *delegatus non potest delegare*: a delegate may not further delegate. Thus, the Minister may not further delegate the authority granted to him by Parliament under the *FRHA* without express or implied authorization. There is no express authorization in the *FRHA* for the Minister to delegate his authority and, as such, the question is whether the *FRHA* can be interpreted to impliedly authorize a sub-delegation of the Minister's authority.

[17] As noted in Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, vol 3 (Toronto: Canvasback Publishing, 2009) at 13-17, the issue is essentially a matter of construction of the legislation. The salient question is whether the provisions of the *FRHA*

and associated regulations (*Fishing and Recreational Harbours Regulations* (SOR/78-767)) (*Regulations*), by necessary implication, authorize the Minister to delegate the authority granted to him to manage the Harbour.

[18] Section 4 of the *FRHA* grants the Minister authority over the scheduled harbours listed in the *Regulations*, one of which is the False Creek Harbour:

Harbours under control of Minister 4. The use, management and maintenance of every scheduled harbour, the enforcement of regulations relating thereto and the collection of charges for the use of every scheduled harbour are under the control and administration of the Minister.	Ports relevant du ministre 4. Le ministre a toute autorité en ce qui concerne l'usage, la gestion et l'entretien des ports inscrits, de même que pour le contrôle d'application des règlements afférents et pour la perception des droits relatifs à leur usage.

[19] Section 8 of the *FRHA* permits the Minister to, among other things, lease any scheduled harbour to any person:

Leases, licences and agreements for use of scheduled harbours 8. The Minister may, subject to the regulations, (a) lease any scheduled harbour or any part thereof to any person; (b) grant a licence to any person for the use of any scheduled harbour or any part	Baux, permis et accords d'exploitation 8. Sous réserve des règlements, le ministre peut, pour tout ou partie d'un port inscrit : a) consentir un bail; b) délivrer un permis d'exploitation; c) conclure, avec le gouvernement ou un

thereof; and (c) enter into an agreement with the government of any province or any agency thereof for the occupancy and use of any scheduled harbour or any part thereof.	organisme d'une province, un accord d'occupation et d'exploitation.

[20] The import of section 8 is that Parliament in fact gave the Minister a number of options by which his authority to delegate could be exercised: by lease, by licence or by agreement.

[21] The authority to lease a scheduled harbour is limited by section 6 of the *Regulations*, which provides:

6. No lease or licence of a harbour or any part of a harbour shall be granted except on terms and conditions that ensure access by the public to the harbour.	6. Un bail ou un permis ne doivent être consentis à l'égard d'un port ou d'une partie d'un port que si leurs modalités assurent l'accès du public au port.

[22] Thus, the Minister is not permitted to simply lease a harbour to an individual for his or her private enjoyment, nor can the Minister lease it to a corporation to run in whatever manner it chooses. Rather, any lessee of a harbour must operate it in a way that ensures access to the public. In my view, these provisions, when read together, imply authorization for the Minister to sub-delegate his authority over the use, management and maintenance of a harbour to its lessee. The lessee is, in effect, authorized to operate and manage all aspects of the harbour as if the Minister had retained control over it. Indeed, the wording of the Lease mirrors, almost precisely, the authority granted to the Minister by Parliament under section 4 of the *FRHA*:

> Purpose
>
> 6. The [FCHA] shall use the Leased Area and the Leased Equipment for the purpose of operating, maintaining and managing a public commercial fishing harbour at False Creek.

[23] The FCHA, for its part, contends that it is, by virtue of the Lease, an independent, not-for-profit corporation, operating at arms' length from the government. The government does not exercise any control or direction over the operation or use of the Harbour, nor does it appoint the harbour management. The FCHA, as a tenant in possession, has *de facto* and *de jure* control over all aspects of the Harbour.

[24] The result of the submissions of the respondent and the FCHA, namely, that the Minister cannot delegate his authority under the *FHRA*, is that the Minister is legally required to control and administer the use, management and maintenance of every scheduled harbour, something they readily concede that he is not doing. They note that the FCHA exercises all aspects of the Minister's authority, including moorage, moorage rates, collection of fees and tariffs, operation and maintenance of docks and related infrastructure. The respondent also concedes that the Minister exercises no residual authority or discretion over the Harbour operations. In essence, the argument devolves to the proposition that, while the Minister, for all practical purposes, has divested all aspects of his statutory responsibility for the management and operation of the Harbour to the FCHA, it is not a delegation because the instrument used to effect the delegation, a lease, is not a formal instrument of delegation.

[25] The respondent and intervener thus ask the Court to overlook or ignore the hiatus or divergence between what they say the Minister cannot do, which is to delegate, and what he is in

fact doing, which is to delegate. The Court prefers an interpretation which is consistent with the legislation and, importantly, an interpretation which provides a legal foundation for what is in fact transpiring. As the Court of Appeal notes in *Anisman*, administrative law principles are engaged by the source of the power, but also by consideration of the public character of the decision and the nature of the rights involved. The formalism urged by the respondent in characterizing whether public law remedies are triggered has long been discarded.

[26] The respondent also argues that the FCHA is not a board because Parliament took care to distinguish, as it did in respect of *ports* as opposed to *harbour*, that port authorities were agents of the Crown, their authority being derived from the *Canada Marine Act* (SC 1998, c 10). However, there is no support for the proposition that an express legislative designation of agency is a necessary pre-condition to a finding that a body is a federal board. Thus, the fact that port authorities are expressly deemed agents of the Crown and are federal boards does not necessarily mean that harbour authorities, because they are not agents of the Crown, cannot in some respects be linked directly to the discharge of the Minister's statutory mandate. As noted, a functional analysis is required, one which focuses on the nature of the decision, the context in which it is taken, and its consequences for the parties.

[27] In addition, section 6 of the *Regulations* recognizes that there is a core public element to the harbour operations. Moreover, the respondent's position that the FCHA, as the holder of a lease, has the unrestrained powers of a private person, does not sit comfortably with the *Regulations*. The purpose and effect of this regulation is not negated simply by the choice of a commercial instrument to achieve a public purpose.

[28] Therefore, I find that the *FRHA* does impliedly authorize the Minister to delegate his authority over the use, management and maintenance of the Harbour, and I further find that the Minister has delegated that authority to the FCHA. I am supported in this conclusion by the guidance from *Brown and Evans* that delegation is more easily found to be implied in the case of Ministerial powers, as opposed to legislative or adjudicative powers. The authority delegated by the Minister in this case is not to pass laws or adjudicate disputes, but rather to manage and operate harbours, which is, in the main, an administrative power.

[29] *Brown and Evans* also emphasize that administrative necessity often requires a finding of implied authorization to sub-delegate. This proposition is directly applicable in this case: it would be impractical to require the Minister to personally manage the operations of all harbours, and therefore he has delegated that authority to local bodies capable of responding to the needs of each individual harbour. As noted, Parliament provided three vehicles by which management and operation of the harbour could be delegated. These considerations further support the conclusion that the Lease constitutes a sub-delegation of the Minister's authority to the FCHA.

[30] Before leaving this issue, I want to address two decisions said to support the respondent.

[31] The first is an Order of this Court by Justice Tremblay-Lamer, *Salt Spring Aquafarms Ltd v Salt Spring Harbour Authority* (5 July 2005), 05-T-24 (FCTD), dismissing a motion for an extension of time to commence an application for judicial review.

[32] This was a motion in writing. It is not evident what arguments were made, let alone whether sub-delegation was in issue. It is also worth noting that while the Court of Appeal upheld the Order dismissing the request for an extension of time, on appeal, it expressly refrained from deciding whether the harbour authority was a federal board, commission or other tribunal: *Salt Spring Aquafarms Ltd v Salt Spring Harbour Authority*, 2006 FCA 20.

[33] The second decision relied on by the respondent and the FCHA is from the Nova Scotia Court of Appeal (NSCA) in *Smith v Harbour Authority of Port Hood*, [1998] NSJ No 248 (CA), in which Chipman JA stated at paragraphs 24-25:

> I disagree with the respondent's submission that this case raised Constitutional issues in the Small Claims Court. It was simply a matter of contract, as the adjudicator found.
>
> Nor do I accept the respondent's submission that the lease was a delegation of powers from the federal government to the appellant. It was simply a commercial transaction whereby the Minister, pursuant to the powers granted in s. 8 of the Act, leased property to the appellant. The Minister delegated no power to make laws. All that was conferred was a property right…

[34] The NSCA was considering a dispute between the harbour authority as a tenant, and the plaintiff, who stood in a contractual relationship. The fact that the harbour authority was not delegated the power to make laws is not determinative; the question is whether the authority vested in the Minister to administer the management of harbours was delegated to harbour authorities. Moreover, the nature and extent of the harbour authority's authority to regulate all aspects of the harbour was not argued before the NSCA.

[35] Section 18(1)(a) jurisdiction is not contingent on the legislation expressly conferring the specific power or function: *Gestion Complexe Cousineau (1989) Inc. v Canada (Minister of Public Works and Government Services)*, [1995] 2 FC 694 (CA). The law of judicial review of administrative action has long outgrown the formalism of the past. Arguments similar to those advanced here, have been rejected. In *Gestion Complex*, it was argued that the Minister's decision to lease property was, like here, a purely commercial transaction and thus beyond the scope of review. After tracing the legislative history of section 18(1)(a) and section 2 of the *Act*, and noting that the purpose of the provision was to provide ready and effective access to justice and to ensure accountability of federal instrumentalities, Décary JA wrote:

> With respect, that would be to take an outmoded view of supervision of the operations of government. The "legality" of acts done by the government, which is the very subject of judicial review, does not depend solely on whether such acts comply with the stated requirements of legislation and regulations. For example, when the Minister makes a call for tenders he is establishing a procedural framework which brings into play the principle of reasonable or legitimate expectation recognized by this Court in *Bendahmane v. Canada (Minister of Employment and Immigration)*, [1989] 3 F.C. 16 (C.A.). See also *Pulp, Paper and Woodworkers of Canada, Local 8 v. Canada (Minister of Agriculture)* (1994), 174 N.R. 37 (F.C.A.).
>
> […]
>
> This liberal approach to the wording of paragraph 18(1)(a) is not new to this Court.
>
> […]
>
> It is readily understandable, if one only considers the litigant's viewpoint and takes account of the tendency shown by Parliament itself to make government increasingly accountable for its actions. In the absence of any express provision, one would hardly expect a bidder's right to apply to this Court to vary depending on whether the call for tenders was required by regulations (as in *Assaly)* or, as in the case at bar, was left to the Minister's initiative.

[36] The analogy to the case at hand is direct and apt. To characterize the FCHA as something other than a federal board simply by reason that the instrument of delegation was a lease would allow for a triumph of formalism over substance. However, as the Court of Appeal makes clear and as will be discussed below, a finding that an entity is a federal board does not mean that all decisions of the FCHA are made in that capacity.

Is the FCHA's decision not to renew the applicant's locker lease reviewable under section 18.1 of the Act?

[37] A finding that the FCHA is a federal board, commission or tribunal does not mean that all its decisions or actions are justiciable. Stratas JA explained this distinction in *Air Canada v Toronto Port Authority*, 2011 FCA 347, at paragraph 52:

> Every significant federal tribunal has public powers of decision-making. But alongside these are express or implied powers to act in certain private ways, such as renting and managing premises, hiring support staff, and so on. In a technical sense, each of these powers finds its ultimate source in a federal statute. But, as the governing cases cited below demonstrate, many exercises of those powers cannot be reviewable. For example, suppose that a well-known federal tribunal terminates its contract with a company to supply janitorial services for its premises. In doing so, it is not exercising a power central to the administrative mandate given to it by Parliament. Rather, it is acting like any other business. The tribunal's power in that case is best characterized as a private power, not a public power. Absent some exceptional circumstance, the janitorial company's recourse lies in an action for breach of contract, not an application for judicial review of the tribunal's decision to terminate the contract.

[38] Thus, the relevant question at this stage is whether the decision not to renew the locker lease was part of the FCHA's public power, or whether it was acting in its private, commercial capacity. In *Toronto Port Authority*, the Court of Appeal observed that the answer to this question requires a

weighing of all the circumstances. Applying those factors to this case, I find that the FCHA's power is a private, commercial power, and therefore not subject to judicial review.

The character of the matter for which review is sought

[39] The matter in this case is the decision to whom to rent gear storage lockers at the Harbour. The FCHA characterizes this as a private commercial matter, while the applicant frames it as closely linked to the FCHA's statutory mandate to operate a public commercial fishing harbour.

[40] The answer to this question is rooted in the evidence. It was undisputed that having the use of or access to a locker was not necessary to the carrying on of business as a commercial fisher. It was a convenience, but it was conceded that other fishers, both at False Creek and elsewhere, actively fish without the benefit of a locker. This fact, that the locker is not integral to the mandate of providing moorage for fishers is critical in the determination that the decision is not part of the public mandate of the FCHA.

[41] As noted by Stratas JA in *White Bear First Nations v Canada (Indian Affairs and Northern Development)*, 2012 FCA 224, para 40, it is important to consider the decision itself apart from its effect:

> This is not to say that the effects of the decision do not enter the analysis. They can: they may be relevant to the assessment of the correctness or reasonableness of the decision. But it is the decision itself that is being reviewed.

[42] Here, neither the decision, nor its consequence, have a public character. While the applicant would prefer to have a locker, it is not, on the clear evidence before the Court, essential to the operation of a commercial fishery.

[43] Ultimately, I find it important to note that the objective in renting out storage lockers is to attract commercial fishers to use the Harbour. Fishers have informed the FCHA that they would be more likely to use the Harbour if they could use a storage locker. Therefore, this decision can be characterized as commercial in the sense that the FCHA is trying to attract greater business to its Harbour to ensure its financial viability. However, given my finding that it is not integral to the operation of a commercial fishery, it has no public character and is beyond judicial review.

The extent to which the decision is founded in and shaped by law as opposed to private discretion

[44] This factor clearly militates against finding the decision to be an exercise of the FCHA's public power. The decision of how to allocate storage lockers is not founded in or shaped by law. The only statutory constraint on the FCHA's operation of the Harbour is that it do so in a way that ensures access to the public, pursuant to section 6 of the *Regulations*.

[45] This decision does not arise as a result of that provision; rather, it was a private, commercial decision on the part of the FCHA to rent out storage lockers to active commercial fishers. As already discussed, the FCHA made this decision for a commercial purpose: to attract more commercial fishers to use the Harbour. There is no argument that access by commercial fishers to the Harbour was contingent upon having a locker. The *FRHA* and *Regulations* do not shape or

constrain the way in which this decision is made; it is dictated by the FCHA's private determination of how best to operate its business and ensure financial viability.

[46] Based on the application of these factors, therefore, the FCHA's decision to terminate the Lease was not an exercise of its public power. The other factors articulated in *Toronto Port Authority*, (the body's relationship to other statutory schemes, the suitability of public law remedies, the existence of compulsory power, and whether the conduct has attained a serious public dimension) are either not relevant or do not alter the conclusion dictated by the factors already discussed.

[47] While this conclusion is sufficient to dismiss the application, I will nonetheless consider the alternative ground on the assumption the FCHA's policy in respect to storage lockers and its decision to revoke the applicant's lease are reviewable by the Court. In this regard, I find that the decision of the FCHA was reasonable and in reaching it the FCHA complied with the duty of fairness. In consequence, even if the FCHA were a federal board in the exercise of the decision to terminate the lease, the application would fail in any event.

Alternative basis for disposition

> ***Was the applicant afforded the requisite degree of procedural fairness by the FCHA in reaching its decision to revoke the Lease of the locker and was the decision to do so reasonable?***

[48] The parties have not submitted a previous decision that identifies the appropriate standard of review for this matter, which means that the Court must undertake the contextual analysis

articulated by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 64:

> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[49] The FCHA submits that the factors enumerated above support the conclusion that the decision must be reviewed on a standard of reasonableness: while there is no privative clause, the purpose of the FCHA (a broad mandate to operate a public commercial fishing harbour), the nature of the question (a matter of policy and discretion), and the expertise of the FCHA in interpreting and applying its bylaws and policies all militate in favour of a reasonableness standard of review. I agree with this assessment and therefore the decision can only be set aside if it falls outside the range of possible, acceptable outcomes in light of the facts and the law: *Dunsmuir* at para 47.

[50] The applicant has also alleged various breaches of procedural fairness which would attract a correctness standard of review. There is no disagreement between the parties on this issue. However, as discussed below, the allegation that procedural fairness was breached is without merit.

[51] On the assumption therefore, that this was the exercise of a public power, the applicant's arguments that the FCHA erred in its decision cannot succeed. In Directive 5.2, the FCHA established a policy reserving storage lockers for active commercial fishers. This was undoubtedly within its discretion in operating the Harbour. The applicant has admitted that he has never used his vessel moored at the Harbour to fish commercially. The applicant would evidently prefer that the

FCHA interpret "active commercial fishers" to include those like him that own a fish quota and lease it out to others, or those whose right to fish has temporarily been suspended by reason of Department of Fisheries and Oceans conservation measures. The Directive, on its face, seems reasonable given the mandate accorded to FCHA by the Minister. Moreover, the applicant has not presented any credible arguments for why the FCHA's interpretation of this term is unreasonable.

[52] The applicant also argues that the policy restricting lockers to active commercial fishers is inconsistent with the FCHA bylaws, which accord membership to anyone, like him, who was a member as of February 3, 2003. The applicant suggests that membership and locker occupancy are interdependent and therefore the locker policy has deprived him of the benefit of membership.

[53] A review of the FCHA bylaws does not bear this argument out: Bylaw 2 grants membership to those who, among other things, own or operate a fishing vessel moored in the Harbour; lease a locker; or have been a member since February 3, 2003. The applicant will continue to be entitled to membership even without leasing a locker by virtue of the latter basis for membership (the 'grandfather' provision). However, as the FCHA submits, the only benefit of membership is not the use of a locker, but rather the right to vote. There is nothing in the bylaws granting members privileged access to lockers. Indeed, the evidence indicates that many other commercial fishers do not have lockers. For these reasons, the argument that the Directive is unreasonable fails.

[54] The applicant has also made several submissions on alleged breaches of procedural fairness all of which are without merit. The duty of fairness owed by the FCHA in this context is minimal and was amply discharged by providing the applicant the opportunity to prove that he was an active

commercial fisher and therefore entitled to continue leasing a locker. The FCHA provided him with written notice and several opportunities to present evidence, including a meeting. The applicant did not provide such proof and, indeed, could not have done so, since by his own account he is not an active commercial fisher. The FCHA reasonably sought proof of income from fishing. When the applicant objected to disclosure of his tax returns on the basis of confidentiality, counsel made reasonable efforts to ensure protection of his personal information.

[55] Finally, the applicant objected to the decision on the basis that not all inactive fishers who had lockers were having their contracts terminated. The individual cases, and the reasons of the FCHA in respect of its application of the Directive to other individual fishers, formed a great part of the cross-examinations. To the extent that it is pertinent, the FCHA had reasonable responses to explain both its policy and its application to the other individuals similarly situated. There was no evidence that the applicant was targeted or singled out for improper, irrelevant, or ulterior motives.

[56] In conclusion, the decision to terminate the Lease was reasonable, as was the policy directive on which it was predicated. The process by which the decision to terminate the Lease was procedurally fair, when assessed against the standard of correctness. The application is therefore dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. The applicant may make submissions on costs within ten (10) days of the date of this decision. The respondent shall reply five (5) days thereafter.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-133-11
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